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IN THE

Supreme Court of the United States

October Term, 1931.

No. 42

STATE OF UTAH, INDEPENDENT COAL & COKE COMPANY and CARBON COUNTY LAND COMPANY,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF INDEPENDENT COAL & COKE COMPANY

MAHLON E. WILSON,
FRANK K. NEBEKER,
Attorneys for Independent Coal & Coke Company.

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POINT I. The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. Neither is the Independent Coal & Coke Company bound or affected by such decree. (Argued) 29-36

POINT II. Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company. (Argued) 36-46

POINT III. The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made. (Argued) 46-52

POINT IV. The State took the grant from the United States, charged with the obligation of establishing and maintaining the Agricultural College and other institutions. This obligation constituted a valuable consideration. The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land. (Argued) 52-54

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BRIEF OF INDEPENDENT COAL & COKE COMPANY

STATEMENT.

This Court issued its writ of certiorari May 18, 1931 (R. 630), to review a judgment and decree of the United States Circuit Court of Appeals of the Tenth Circuit, dated January 14, 1931 (R. 626) (46 Fed. (2d) 980), reversing a judgment of the United States District Court for the District of Utah, dated June 11, 1929. (R. 97)

PROCEEDINGS IN PRESENT SUIT.

May 16, 1924, ORIGINAL BILL IN EQUITY filed by the United States in United States District Court for the District of Utah against Carbon County Land Company and Independent Coal & Coke Company and Carbon County. The purpose of the bill, as indicated by its prayer, is to have the defendant companies decreed to hold title to 5564.28 acres of land situated in Carbon County, Utah, in trust for the plaintiff, "subject only to the mortgage taken

by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States." (Quotation from original bill of complaint, transcript of record on former hearing in this court, page 5.)

Carbon County had a tax lien on a portion of the lands, but the suit as to it was dismissed by the Circuit Court of Appeals of the Eighth Circuit. (9 Fed. (2d) 517)

Defendants made motions to dismiss, claiming a bar of the Statute of Limitations, to-wit: Section 8 of Act of March 3, 1891.

January 12, 1925, DECREE DISMISSING BILL. (Original transcript 24.)

There was then an appeal to the United States Circuit Court of Appeals of the Eighth Circuit.

November 21, 1925, DECREE OF UNITED STATES CIRCUIT COURT OF APPEALS OF EIGHTH CIRCUIT, reversing decree of District Court. (9 Fed. (2d) 517)

Thereupon defendants applied to this Court for writ of certiorari.

Up to this time the State of Utah had not been a party to this action, nor participated therein, but the State, by its Attorney General, then petitioned this Court for permission to file brief in support of petitions for writ of certiorari, setting up its purchase money mortgage to secure an indebtedness of $556,428. The petitions of the defendants and the State were granted March 22, 1926. (270 U. S. 639)

May 31, 1927, DECISION OF SUPREME COURT (majority opinion), affirming decision of Circuit Court of Appeals of Eighth Circuit and remanding case to District Court for the District of Utah for further proceedings. (274 U. S. 640)

December 9, 1927, AMENDED BILL OF COMPLAINT filed by United States. (R. 1 et seq.)

October 18, 1928, ANSWER OF INDEPENDENT COAL & COKE COMPANY filed (R. 21-35), avering ownership in Section 3 and the north half of Section 10 and the northwest quarter of Section 11, Township 13 South, Range 10 East, consisting of 1120 acres of land situated in Carbon County, Utah, and averring that it purchased said land on the 16th day of October, 1920, in the manner following: By transferring and delivering to the Carbon County Land Company 369,000 shares of its capital stock, having a par value of one dollar a share and an actual value of at least sixty cents a share, and by entering into an agreement with the State of Utah whereby the Company agreed to pay to the State the sum of $112,000, or $100 per acre, for said 1120 acres of land, and whereby the State agreed to release to it said 1120 acres of land upon payment to the State by said Independent Coal & Coke Company of said $112,000. (R. 22-23)

In its answer the Independent Coal & Coke Company admitted that while it knew that the suit between the United States and Milner, referred to in Paragraphs 3 and 4 of the amended bill, had been tried and determined, as is alleged in Paragraph 3 of said amended bill, it also knew and relied upon the fact that the State of Utah was not a party to that suit, and said defendant did not believe that the State of Utah was in any wise bound by that decree, or any part thereof; and said defendant further averred that the United States had, on or about the 8th day of January, 1907, represented to the State of Utah that it was no part of the purpose of said suit (referring to United States v. Milner) to [illegible]y wise disturb or affect the title of the State of Utah to the lands described in said suit and in said decree; and this defendant further averred that it knew the State of Utah had claimed ownership of these lands from the date of certification by the Government to the State up to and including February 10, 1920.

And the said defendant further averred that the 1120 acres above described were in part adjacent to and in part contiguous to other lands owned by the defendant herein; that the defendant was operating a large coal mine, and it knew that if the 1120 acres remained Government land, the fact of ownership by the Government would not in any wise disturb the operations of the defendant and its coal

mining properties; but if these lands were to be the subject of private ownership, and were to be sold to competitors, it would become intensely inconvenient and embarrassing to this defendant in the operation of its coal mines upon its other lands adjacent and contiguous to said 1120 acres. (R. 24) (See also Paragraphs 18 and 19 of said answer, R. 30-31.)

Defendant further averred that it had entered into possession of said lands in October, 1920; and made valuable improvements thereon; that said lands had been placed upon the assessment rolls for purposes of taxation by the State and by Carbon County, and that taxes had been levied upon said lands and paid by the defendant to the extent of $40,170.69. (R. 32) (This amount should be corrected and should read $39,949.53 for the years 1920, 1921, 1922 and 1923.) (No taxes paid since suit was started in 1924.)

October 22, 1928, COMPLAINT IN INTERVENTION filed by State of Utah by leave of Court. (R. 35 et seq.)

November 26, 1928, OBJECTIONS OF UNITED STATES to application of State to intervene overruled. (R. 46-47)

November 26, 1928, ANSWER OF CARBON COUNTY LAND COMPANY. (R. 48)

November 27, 1928, REPLICATION OF UNITED STATES to answer of Independent Coal & Coke Company, admitting that State of Utah acted innocently of any fraud in making selection of land involved. (See Paragraph 5, page 63.)

February 6, 1929, ANSWER AND COUNTERCLAIM of United States to complaint in intervention of State of Utah. (R. 70 et seq.) Counterclaim commences with Paragraph 16, Page 75 of the record. Among other things it is alleged in substance in Paragraph 29 that while the State of Utah intended no fraud, it was made "a potential factor" in a fraud committed by Milner and his associates, and that the Land Department had no "*jurisdiction*" to act upon the State's application to have the lists for the land certified. (R. 89) (Land Department had both duty and power.)

The prayer to this counterclaim is in substance as follows: that the Court decree that whatever title to lands involved passed to State was in turn passed by State to Carbon County Land Company, and that the same inured to the benefit of the plaintiff, and that the mortgage of the State and the tax deed be cancelled, and that the title of the United States be quieted as against the State; and, in the alternative,

> "in the event that the Court does not by its decree, adjudge, determine and declare against the State of Utah that whatever title passed to the State by said certifications of the lists selected in and to said lands as vested in the State's grantees for the use and benefit of the United States, that the certification of said land so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up, to be cancelled, and that the Court, by its decree cancel and annul the same, and by its decree cancel and annul the patent so issued by the State of Utah to the Carbon County Land Company, as hereinbefore alleged." (R. 92-93)

April 6, 1929, AMENDMENTS TO ANSWERS filed by Coal Company and Land Company. (R. 93-94)

April 6, 1929, REPLY OF STATE OF UTAH to counterclaim of United States, alleging, among other things, bar of statute, to-wit: Section 8 of Act of March 3, 1891, and alleging that the United States at all times prior to May 9, 1904, and for more than one year thereafter, had classified the lands involved as non-mineral in character, and that it never at any time until the commencement of the action entitled "United States v. Milner", on January 7, 1907, pretended or claimed that the lands were of a known mineral character. (R. 95)

June 11, 1929, JUDGMENT OF DISTRICT COURT, decreeing lands to the State of Utah. (R. 97)

January 14, 1931, DECISION OF CIRCUIT COURT OF APPEALS of Tenth Circuit on appeal, reversing decree of United States District Court (R. 611-636) (See decree January 14, 1931. R. 626; mandate R. 627.) (46 Fed. (2d) 980)

JURISDICTION.

May 18, 1931, ORDER of this Court allowing certiorari, (R. 630) pursuant to Section 240A. Judicial Code Act of Feb. 13, 1925 (U. S. C. Title 28, Sec. 347).

FEDERAL GRANTS TO STATE CONTAINED IN ENABLING ACT.

On July 16, 1894, the Congress of the United States passed what is known as the "Enabling Act", to enable the people of Utah to organize a State government, and in that Act made certain grants from the unappropriated public domain to the State of Utah for certain purposes—among others, 100,000 acres for the use of an agricultural college; 100,000 acres for the establishment and maintenance of a school of mines in connection with the University; 100,000 acres for the establishment and maintenance of a deaf and dumb asylum. (See Sections 8 and 12; other grants omitted as irrelevant.)

This Enabling Act clearly manifests the legislative intent that these lands were granted for particular purposes, and that an obligation was imposed upon the State to keep either the lands or the funds derived from the sale or lease of such lands securely for the particular purposes designated. Outside of certain sections designated as "school sections", the lands were to be selected by the State under the direction of the Secretary of Interior of the United States. (Section 13)

Lands Involved in this Suit: 5564.28 acres, situated in Carbon County, Utah, divided into five different tracts:

1. *1920 acres, School of Mines Grant*: Selected by State December 17, 1900; List No. 32 (R. 310); grant approved by Secretary of Interior June 22, 1901. (R. 561)

This selection by the State shows a large quantity of land and includes the 1920 acres described in the first paragraph of the description set forth in the decree. See agreement to purchase lands from State by Stanley B. Milner, dated August 1, 1901; purchase price, $2880, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1911. (R. 261-262)

2. *320 acres, Agricultural College Grant*: Selected by State August 22, 1901; List No. 67 (R. 277); grant approved by Secretary of Interior December 23, 1901. (R. 560)

This selection by the State shows a large quantity of land and includes the 320 acres described in the second paragraph of the description set forth in the decree. See agreement to purchase lands from State by Truth A. Milner, dated February 1, 1902; purchase price, $480, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1912. (R. 331-332)

3. *477.04 acres, Agricultural College Grant*: Selected by State April 2, 1902; List No. 71 (R. 281); grant approved by Secretary of Interior July 9, 1903. (R. 560)

This selection by the State shows a large quantity of land and includes the 477.04 acres described in the third paragraph of the description set forth in the decree. See agreement to purchase lands from State by Truth A. Milner, dated August 1, 1903; purchase price, $715.56, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1913. (R. 333-334)

4. *2244.24 acres, Agricultural College Grant;* Selected by State March 24, 1903; List No. 75 (R. 303); grant approved by Secretary of Interior May 9, 1904. (R. 560)

This selection by the State shows a large quantity of land and includes the 2244.24 acres described in the fourth paragraph of the description set forth in the decree. See agreement to purchase lands from State by Harley O. Milner, dated June 1, 1904; purchase price, $3366.36, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1914. (R. 336)

(*This includes the 1120 acres claimed in this suit by the Independent Coal & Coke Company.*)

5. *603 acres, Deaf and Dumb Asylum Grant*: Selected by State September 15, 1903; List No. 52 (R. 268); grant approved by Secretary of Interior December 1, 1904. (R. 560)

This selection by the State shows a large quantity of land and includes the 603 acres described in the fifth paragraph of the description set forth in the decree. See agreement to purchase lands from State by Samuel H. Gilson, dated April 15, 1905; purchase price, $904.50; payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1915. (R. 339-340)

It can be seen from an examination of these contracts, whereby the State agreed to sell and Milner and his associates agreed to buy, that in not one of the contracts had full payment been made on January 7, 1907, when the suit entitled "United States v. Milner", was commenced. The last installment for the first subdivision was due January 1, 1911; second subdivision, January 1, 1912; third subdivision, January 1, 1913; *fourth subdivision, January 1, 1914,* and fifth subdivision, January 1, 1915; and yet, on January 8, 1907, (R. 263-266) it was resolved by the State Land Board as follows:

> "that final payment upon said lands shall not be accepted by this Board until the right of said applicants to demand a patent for said lands shall be determined by said court." (Referring to the court in which the case of United States v. Milner was pending.)

With the record in such a state, it is submitted that there is no basis in fact for the contention that Milner, or any of his associates, had fully paid for any of the lands, or that they, or any of them, had any equitable title to any of the tracts described. It is true that they claimed a right to purchase under their contracts, but the validity of those contracts had been brought in question in a direct proceeding to set aside those contracts, and at the time the United States, through Mr. Maynard, brought this suit the equities of the persons who were attempting to purchase (judging by the amounts paid) were indeed small.

PROCEEDINGS IN UNITED STATES V. MILNER, ET AL., RESULTING IN DECREE OF 1914.

January 7, 1907, suit instituted by the United States against Milner, et al., including Carbon County Land Company. (R. 175-195)

Note: It is not alleged that the State of Utah participated in the alleged fraud and is predicated upon the erroneous proposition that the General Land Office had no *jurisdiction* to act upon the State's applications. (R. 189)

Prayer: It seeks a judgment decreeing that none of the Milners, or their associates, ever had or acquired any right, title or interest in or to the lands; that the contracts entered into are void; that the defendants and each of them be adjudged, decreed and directed *to surrender up to the State of Utah for cancellation* any and all contracts and agreements. (R. 194-195)

January 8, 1907, (R. 263) appearance of Maynard before Land Board. (See stipulation that if the witness Candland were present he would testify that these proceedings took place as of the date mentioned. (R. 276)

September 26, 1907, second amended bill in equity. (R. 195-206) Prayer in substance the same as prayer to the original bill.

Answers were filed to this amended bill.

Testimony was taken before Master in Chancery in 1910 and submitted to the Court for decision.

June 8, 1914, the Court entered its decree.

November 15, 1915, decree affirmed by Circuit Court of Appeals of Eighth Circuit. (228 Fed. 431) (248 U. S. 594).

CASE AT BAR.

TRIAL IN DISTRICT COURT, APRIL, 1929.

On the trial in the District Court a great amount of documentary evidence was introduced, and, over the objection and exception of the defendants the testimony of Joseph A. Taff, P. S. Sowers and E. D. Dunn, witnesses who testified in 1910 in the case of United States v. Truth A. Milner, et al., was read in evidence in the instant case by agreement but subject to all objections for incompetency, irrelevancy and immateriality that might be made. (R. 103)

The State of Utah, in its objection to the testimony of these witnesses, took the position that the Government must show these lands were mineral in character, and were known to be mineral at the time and prior to the time when they were certified to the State of Utah by the United States.

The Independent Coal & Coke Company joined in the objections, and contended that upon the certification the title passed to the State, and that it is immaterial now in the proceeding, wherein the State is a party, whether the lands were known mineral lands or not,—the Statute of Limitations having run in behalf of the State many years prior to the institution of the present action. (R. 105-106)

The Carbon County Land Company joined in the objection and added the additional objection that the Government was making an effort to apply a rule for the determination of the character of the land that did not prevail at the time when the certifications were made. (R. 106) (It is believed that each and all of these objections were sound.)

Before undertaking to quote any portion of the testimony, the Independent Company desires to make clear its relation to this land and this suit as it is shown by the evidence contained in the record.

INDEPENDENT COAL & COKE COMPANY DID NOT PARTICIPATE IN ANY FRAUD BUT HAS ACTED WITH THE UTMOST GOOD FAITH TOWARD THE UNITED STATES, THE STATE AND THE CARBON COUNTY LAND COMPANY.

The Independent Coal & Coke Company is a Wyoming corporation organized under the laws of that State October 22, 1906. (R. 394 et seq.) The incorporators were W. C. Orem, C. N. Strevell, L. H. Curtis, A. J. Orem, Richard P. Morris, A. L. Pearse, James H. Patterson, Frederick A. Sweet and Foster J. Curtis. Outside of Mr. Strevell, none of the original incorporators have been stockholders since 1919. At the time of its organization this Company had a capital stock of $1,000,000, divided into 1,000,000 shares of the par value of one dollar each, and had approximately 900 acres of land situated in Sections 9, 16, 17, 19 and 30, Town-

ship 13 South, Range 10 East, in Carbon County, Utah. Since its organization its capital stock has been increased to 2,500,000 shares of the par value of one dollar each, and it has materially increased its land holding and land ownership in Carbon County, Utah, so that now it is one of the largest coal operating companies in the State. At the time of the trial of this case it had approximately 302 stockholders, residing in Louisville, Kentucky; Peoria, Illinois; Chicago, Illinois; San Francisco, California, and even in England and France. (R. 428)

In about the year 1906 Frederick A. Sweet and others associated with him, went into what is known as "Bull Hollow", situated somewhere near the present camp of Kenilworth, and opened up what is known as the Kenilworth mine. This mine did not come into active operation until about 1907. (R. 366) The camp of Kenilworth was started in the year 1907. (R. 361) It belongs exclusively to the Independent Coal & Coke Company and is located in the north half of Section 21 and the south half of Section 16, Township 13 South, Range 10 East, approximately one mile from the nearest point of the 1120 acres which the Independent Coal & Coke Company claims in this suit. The north half of Section 16, although a school section, was taken up as coal land, whereas, the south half of Section 16, upon which a part of the present camp of Kenilworth is located, was agricultural land. No coal was ever found in the south half. (R. 362) (This fact is recited to make manifest how the character of this land may be one thing in a part of a section and an entirely different thing in another part of the same section.)

The Independent Coal & Coke Company has continued to operate its mine and extend the camp of Kenilworth and improve the same from the time of its organization down to the present day.

Stanley B. Milner, deceased since 1908 at no time during his life had any connection with the Independent Coal & Coke Company, either as an organizer, officer, stockholder or otherwise, and none of his family ever owned any stock in the Independent Coal & Coke Company until the transaction of October, 1920, hereinafter explained.

The Independent Coal & Coke Company never had anything whatsoever to do with the certification of the lands here involved by the Government to the State of Utah, or with the litigation between the United States Government and the Milners between the years 1907 and 1915. Neither has the Independent Coal & Coke Company at any time been in any wise interested in the Carbon County Land Company. The Independent Coal & Coke Company does not claim any interest in any of the lands involved here except it claims to be the owner of *Section 3 and the north half of Section 10 and the northwest quarter of Section 11, Township 13 South, Range 10 East,* which is a part of the 2244.24 acres Agricultural College grant. Selected by State March 24, 1903; List No. 75 (R. 560); *grant approved by the Secretary of Interior May 9, 1904.* (R. 560).

Although this land was certified by the Government to the State May 9, 1904, and although the suit of United States v. Milner, et al., was commenced January 7, 1907, and was decided favorably to the Government June 8, 1914, and the decree affirmed by the Circuit Court of Appeals of the Eighth Circuit November 15, 1915, no proceeding was ever brought by the United States to compel a transfer of title of this land from the State to the United States. In fact, the bills of complaint filed in the suit of United States v. Milner pray that the defendants be adjudged, decreed and directed to surrender up to the State of Utah for cancellation any and all contracts and agreements that they or any of them now have with the State for any of the lands described in this bill of complaint. (R. 194, original bill; R. 215, amended bill.)

On January 8, 1907, Mr. F. E. Maynard, Special Assistant to the Attorney General of the United States and attorney for the United States in the suit entitled "United States v. Milner", appeared before the State Land Board of the State of Utah, and, among other things, said:

> "the purpose of his appearing before the Board was to officially inform Board of the fact that the Attorney General of the United States has caused to be filed a bill of complaint in the Federal Court, and I herewith hand you a copy which I serve upon you, and desire it to become a part of your files. The State of Utah has purposely not been made a party to this bill."

Mr. Maynard then read the latter part of the bill and made the following statement:

> "You will see that the only relief we ask is that you be relieved from your contract that you entered into with the Milners. That the legal title to the land is in you now and if the Government is successful will be in the State of Utah. We do not seek to deprive you of these lands, but we do seek to prevent these valuable claims from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it." (R. 263-264)

On Record Page 276 it was stipulated that if Mr. Candland (who was one of the Land Commissioners in 1907) was called as a witness he would testify that these proceedings were the minutes of the State Land Board as of the date mentioned.

Between the final determination of the case of United States v. Milner in 1915, and May 16, 1924, when this suit was started, no claim was made by the Government to any of these lands, and said lands were claimed by the State of Utah from the date when they were certified in the years 1901-04 and were charged to the State in pro tanto satisfaction of grants.

On February 10, 1920, the State of Utah, then claiming these lands which included the 1120 acres claimed by the Independent Company, entered into a transaction with the Carbon County Land Company, whereby the State, by its State Patent, conveyed all of the lands involved in this suit to the Carbon County Land Company at the purchase price of $100 per acre, or $556,428. This transaction was carried on by Governor Simon Bamberger and Attorney General Dan B. Shields, and other officers representing the State, and by Samuel A. King, Esquire, then a member of the firm of King, Braffet and Schulder, and by Mr. A. C. Milner, representing the Carbon County Land Company. (R. 574-575)

The Carbon County Land Company did not pay any money for the land, but it gave its notes for the full amount of the purchase price. These notes are dated January 2, 1920, and may be described as follows: $100,000 due January 2, 1930; $200,000 due January 2, 1940, $256,428 due January 2, 1950. (R. 384) They bear interest at the rate of five per

cent. per annum from January 2, 1925, and recite that they are secured by a mortgage of even date on the 5564.28 acres of land. The patent from the State to the Carbon County Land Company was recorded February 24, 1920, and the mortgage given by the Carbon County Land Company was recorded on the same day. (See Record Pages 384 and 592.)

The Independent Coal & Coke Company did not in any wise participate in this transaction between the Carbon County Land Company and the State of Utah.

CONTIGUITY OF THE TRACT OF 1120 ACRES TO OTHER LANDS OF THE INDEPENDENT COMPANY.

The tract of 1120 acres of land, together with the west half of Section 2 and the east half of the southeast quarter of Section 10 (land already owned by the Carbon County Land Company), making a total tract of 1520 acres, was so located and situated with reference to the other property of the Independent Coal & Coke Company that if such land were to become the subject of private ownership and be worked as a mine, it could be worked more advantageously by the Independent Coal & Coke Company than by any other concern or person, and if any other person or concern than the Independent Coal & Coke Company were to work said land and mine coal therefrom, then the coal could be secured only by means of tunnels driven through the land of the Independent Coal & Coke Company, and if such tunnels were driven from the land of the Independent Coal & Coke Company this would result in great inconvenience, disadvantage and even business embarrassment to the Independent Coal & Coke Company. Even the products derived from the land would of necessity be conveyed to Kenilworth Junction on the D. & R. G. Railroad, through Kenilwo[illegible]camp. For these reasons the Independent Coal & Coke C[illegible]any was virtually compelled to buy this land from the Carbon County Land Company as a matter of self-preservation. A mere assertion of a claim by the government would have prevented any sale.

The State claimed the transaction was a valid one; the Carbon County Land Company made a like claim. It was all a matter of public record, and the United States Government, through its officers, took no action and had taken none at any time against the State or at all since 1915; *or even before.*

EXAMINATION OF TITLE BY INDEPENDENT COAL & COKE COMPANY.

The Independent Coal & Coke Company caused its regular counsel, M. E. Wilson, Esquire, to examine the validity of this title, and on September 15, 1920 (R. 418) he gave an opinion that the title was good and marketable referring, among other matters, to the decision in Milner v. United States, 228 Fed. 431, and stated:

> "In my opinion, however, this did not in any wise affect the legal title to the lands which, by reason of the certification, was in the State of Utah. It has been definitely and unequivocably held that the certification of the lands operated to transfer the legal title to the State of Utah."

At another place in his opinion he states that he submits the opinion of the *Hon. C. W. Morse,* who was employed specially to give an independent judgment relative to this title.

Judge Morse was called as a witness on the trial. (R. 378) It appears that he was 72 years of age; that he had practiced law 40 years; that he was one of the District Judges of the Third Judicial District of Utah for 16 years, and during that time had charge of the equity division of the court; that he retired from the bench in January, 1917; that in 1920 he was employed to render an opinion in regard to the title to the land involved; that the employment was in the regular course of business, and he was paid for it. That opinion appears on Record Pages 379 to 382. Among other things he says:

> "If I am correct in the assumption that the selection by the State Land Board and the certification under such selection by the Secretary of the Interior passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that the Statute of Limitations above referred to would inure to the benefit of the State of Utah or any one holding title under it to these lands." (R. 381)

Relying upon these opinions, and the fact that it was generally conceded that the transaction was a valid one, and particularly upon the fact that there had been such a great

lapse of time without any effort on the part of the Government to disturb the title of the State which Mr. Maynard had said would not be disturbed, the Independent Coal & Coke Company transferred to the Carbon County Land Company 500,000 shares of its capital stock, having a par value of $1.00 per share and an actual value of at least sixty cents per share, and took in return therefor the deed of the Carbon County Land Company to 1520 acres of land, which included the 1120 acres involved in this controversy, and assumed and agreed to pay to the State of Utah the $112,000 mortgage indebtedness which existed in favor of the State and was secured by mortgage upon said land. Let it be said that approximately 369,000 shares of this capital stock should be allocated to the 1120 acres.

On Page 436 of the record there appears the deed of the Carbon County Land Company to the Independent Coal & Coke Company, and as a part of the same transaction, the State and the Independent Coal & Coke Company entered into an agreement whereby the State Land Board agreed, for the State, to release the 1120 acres to the Independent Coal & Coke Company when said Company paid the $112,000. (R. 409) (See copy of minutes of State Board of Land Commissioners.)

Under such circumstances it is believed it is reasonable and fair to contend that the relation between the State and the Independent Coal & Coke Company became a direct one, and that the Independent Company had a direct obligation to pay the State and the State had a direct obligation to convey the 1120 acres of land to the Independent Coal & Coke Company, and that this transaction is not tainted with any fraud that had theretofore been committed by either the Milners or the Carbon County Land Company, if fraud had been committed.

TAXES AND IMPROVEMENTS.

It is shown by this record that the Independent Coal & Coke Company entered into the possession of this tract of 1120 acres; that it has been assessed for taxes by the State and its various subdivisions, commencing in the year 1920, and ever since; that the Independent Coal & Coke Company has paid taxes for the years 1920, 1921, 1922 and 1923 to the

extent of $39,949.53 (R. 104); that it has paid no taxes for the year 1924, or any year since, on acount of the pendency of this suit and an agreement made with the State officials relative to that matter. (R. 432) But the Independent Coal & Coke Company stands ready and willing to pay those taxes if the lands are held to have been taxable.

In addition to the taxes, the Independent Coal & Coke Company, between October, 1920, and May 16, 1924, the date of the commencement of this suit entered into the possession of this land, and commenced to work thereon. All of its work has been confined to the north half of Section 10. Among other things, it has constructed a tunnel extending 1100 feet into the land in controversy. This tunnel was driven through solid rock and cuts both seams of coal, which come down on a nine per cent. pitch. *To develop and produce this coal this tunnel was necessary.* It cost the Independent Coal & Coke Company $100,000, and was made in reliance upon this title. The Company did not get any coal in driving the tunnel (R. 431-432), but secured about 100,000 tons by reason of having driven the tunnel. (This shows the difficulties that were encountered by necessity in extracting coal from this land.)

A part of the land can be reached by another tunnel. This was constructed *on other land* owned by the Company than the land in controversy, and was at the time of the trial 8000 feet in. It was driven through solid rock to develop the land in controversy. That tunnel cost $260,000. *The Company would not have driven that tunnel except to reach the coal in the land in controversy.* All this work was done between October, 1920, and May 16, 1924, when this suit was commenced.

At the time of the trial, Mr. Tonkin, the then General Manager of the Company but now deceased, estimated, without accurate calculation, that the Company had taken 100,000 tons of coal from the north half of Section 10. (R. 432) On Page 434 of the record, referring to the entire tract of 1520 acres (which includes the 1120 acres), he testified:

> "We did not make an estimate of the coal content of the entire tract. For purposes of our own we did make an estimate of what we hoped it would be in mining, laying our plans out. For example, in this entry

in here that coal is thinned down now to 6½ feet. Sometimes it will go out entirely. By going out, I mean run into burning. Yes, on this particular tract of land we have indications of burning over in here on the top seam. We haven't found any pinchouts yet."

And again he says:

"I cannot tell with a reasonable certainty just what extent we will find this land burnt out until we actually go into it and work it. Nobody can. The proof of the pudding is in the eating of it, and the proof of mining is in the working. That is generally true of coal mines. I have had 40 years experience in coal operations, in Pennsylvania, British Columbia, Illinois and Utah."

And again he says:

"The western states are about the only places where we encounter it. It is quite common in Carbon County and in parts of Colorado. I wouldn't say that it makes it impossible for a man to render an opinion from mere inspection where he finds evidence of that burning and runs into it because one man's guess is as good as another's as to how far this burning goes. If you have a cropping of sufficient thickness that indicates there has been commercial coal there and you are willing to take a gamble on the extent of this burning, I would say, you could tell whether there would be commercial coal beyond it or not. You are taking a gamble. You have no absolute knowledge about it." (R. 435-436)

This testimony is quoted to show the uncertainty that of necessity inheres in the opinion of experts relative to the commercial workability of any land as coal land.

It appears from the record that no coal has been taken from any of the land in controversy except the north half of Section 10, Township 13 South, Range 10 East, and this statement applies to the entire 5564.28 acres, and, so far as the record shows, no taxes have been paid by the Carbon Coun-

ty Land Company, and *Carbon County* was therefore made a defendant in this suit by the Government to cancel tax liens. (Dismissed by C. C. A. 9 Fed. (2d) 517)

It also appears from the record that the major portion of the 500,000 shares of capital stock transferred by the Independent Company to the Carbon County Land Company has been sold by that Company (R. 430); that dividends have been paid upon that stock the same as other stock—six per cent. per annum; that this Independent Company has paid approximately six per cent. per annum ever since 1919 (R. 430); that so far as the company or its officers were concerned, they had no purpose whatever to cheat or defraud the Government; they felt they were acting honestly. (R. 430)

It is believed that a consideration of the facts above recited will make it apparent to every reasonable man that the Independent Coal & Coke Company acted with the utmost good faith; that it did not know of any fraud; that it did not believe there had been any fraud, and that it had no intention to cheat or defraud the Government, or to in any maner aid or abet such an act. Instead of benefiting by the transaction it has suffered materially, as the expenditure of $360,000 for tunnels and approximately $40,000 for taxes, will show. Outside of the workings in the north half of Section 10, and outside of the coal which the Independent Company has extracted therefrom, for which it stands ready, willing and able to account, the land involved has not been injured or even interfered with in any respect.

The Independent Company takes the position that the transaction was an honest and legal one, and if this Court shall so hold it is ready, willing and able to pay to the State whatever sum shall be found due the State for and on account of the mortgage indebtedness which it assumed, and to pay to the State and its county whatever taxes have been lawfully assessed on said land. If, on the other hand, this Court shall decide that this tract of 1120 acres belongs to the United States, then the Independent Company stands ready, willing and able to pay any amount that in the judgment of the Court it is decreed shall be paid on accounting. This attitude on the part of the Independent Company has been constant and indicates the highest degree of good faith.

TESTIMONY RELATIVE TO CHARACTER OF LAND

> "There was no exposure of commercially valuable coal on any subdivision of the lands selected." (Quotation from the opinion of the Circuit Court of Appeals, 46 Fed. (2d) 982.)

This quotation is supported by the record.

An examination of the testimony of Joseph A. Taff, taken in the case of United States v. Milner, will disclose the following facts: That he examined the lands involved for the purpose of ascertaining their character in 1906 and 1909 (R. 108); that it was a rule of the General Land Office laid down generally, prescribing the method by which the character of land should be ascertained, that unless commercially valuable coal is exposed on each legal subdivision of forty acres, then such land could not be classified as coal lands. On September 5, 1905, he wrote, among other things, as follows:

> "To this ruling the United States Land Office and the State Land Board have been and are now subject." (R. 143)

It appears that Mr. Taff was not in sympathy with this rule and claimed that it was nonsensical (R. 144), and sometime in the year 1906 he undertook to "start something" in the direction of removing such "*ridiculous*" rules in regard to the classification of coal lands. (R. 144)

He further says:

> "It must have been in the early part of 1907 that I made my classification upon these lands in question, and did not determine whether or not these lands in dispute were coal lands until that time." (R. 145)

On Page 163 of the record he makes the following statement:

> "In my opinion there are certainly subdivisions of land included in the lands in question of 320 acres that could not be operated profitably, possibly. I would designate those that lies along on the highland in the plateau, taking those individually, as the North half of Section 1, and the North half of Section 2, and the

North half of Section 3, Township 13 South, Range 10 East. The same would probably apply to the West half of Section 33, and possibly to the East half of the same Section, the North half of Sections 26 and 27, in Township 12 South of Range 11 East. These individual tracts are the least accessible, and have the deepest cover over the coal." (R. 163)

If we are to take this testimony as true, and it is the testimony upon which the Government relies, then the north half of Section 3 (a part of the 1120 acres claimed by the Independent Coal & Coke Company) is not coal land.

On Page 569 of the record Mr. J. C. Dick gave testimony on the trial of this case. His testimony shows that he was a civil engineer by profession; that he made government surveys in the year 1900, and he says:

"I think I remember the instructions I was given at that time. Those instructions emanated from the Surveyor-General's office of the United States. All surveyors have the same instructions in this intermountain country. We were instructed to report all lands as coal lands upon which coal outcropped only. I tried to carry out those instructions. That was the general practice among the persons surveying for the Government. It was returned to the Surveyor-General's office in connection with my field notes for record, and they were made and filed here in the General Land Office."

And again:

"I reported as coal lands all lands upon which a coal outcrop appeared. Where there was a quarter section of 40 acres, a subdivision upon which no coal appeared, it was not reported as coal land. In other words, unless there was an outcrop on each forty-acre tract, I didn't report that particular tract as coal land." (R. 569)

And again:

"If I didn't find any coal outcropping, I would report it as grazing land, or agricultural land, whatever it was."

On July 29, 1904, Mr. P. S. Sowers, a witness for the Government, in the case of United States v. Milner, wrote the Commissioner of the General Land Office at Washington, and, among other things, said:

> "The land is broken by small secondary canyons that do not reach to the depth of Coal Creek Canyon (and) (when the coal crops) and above the coal if it exists under the said land which as it dips would be from 1000 feet to 1500 feet at the north line, it could at this time after have no commercial value, even in considerable deposits, because of its practically being inaccessible to the market, while coal mines are now being operated on the line of the D. & R. G. Ry. thirty miles west; but if the coal is under said land in quantity it would have a value as a reserve some day when the other mines are 'dug out'. *Most of this land is fitted for cattle ranging and very good,* but is not used at present for any purpose. While the coal vein probably is under this land or *some parts of it,* yet I could *find no man who would make an affidavit to it as a fact* because of the absence of croppings or work to prove it." (R. 458) (Italics ours.)

(See testimony of Witness Dunn, read into the record from the case of United States v. Milner (R. 521):

> "I know, as a matter of fact, however, that under the rules and regulations, special or general of the Commissioner of the General Land Office and the Secretary of the Interior, that the local land office were not permitted to receive coal declaratory statements upon any of the public lands other than those upon which an exposure of coal had actually been made."

From such a record, and there is no conflict in the evidence, it seems to be beyond dispute that this land was grazing land at the time it was certified to the State by the Secretary of Interior in the years 1901-4. (Latest certificate being dated December 1, 1904, and the certificate which included the 1120 acres being dated May 9, 1904.)

It is true that in 1911 the United States Circuit Court of Appeals for the Eighth Circuit announced a different rule in United States v. Diamond Coal & Coke Company, 191 Fed. 786, and said:

"It is sufficient if the land is generally regarded by the local public as having a special value for its coal content beyond its value for agricultural or like purposes."

But, even applying the test adopted by the Court, still the character of the land in question does not satisfy that test because, as the witness Sowers said, he could "find no man who would make an affidavit to it as a fact, because of the absence of croppings or the work to prove it." (R. 458)

It is true that a different rule was announced by this Court in April, 1914, United States v. Diamond Coal & Coke Company, 233 U. S. 236, but up until 1911 the standard by which a given tract of land was to be determined as coal land or non-coal land was either outcropping or actual work, and the evidence conclusively shows not only that there was no outcropping upon any of this land, but that there had never been any actual work done upon the land until between October, 1920, and May 16, 1924, and the work then done by the Independent Company was done at the expense of driving two tunnels costing $360,000.

The evidence referred to herein is in the main the evidence of the Government. We call attention, however, to the testimony of the witness Mark Hopkins. (R. 444-445) This witness was a mining engineer and geologist 67 years of age. His operations had been in Pennsylvania, Wyoming, Colorado and Utah. At one time he had charge of the operations of the Union Pacific in Colorado, Utah and Wyoming. (R. 444) He first went into Carbon County for the purpose of studying coal lands in about 1890. (R. 444) Among other things he says:

"As to the inferences which would appear and the geological facts from which you drew the inference, you have present a strata that could contain coal. That is the outcrop, and it may go back. The outcrop in this case absolutely is somewhere within a quarter of a mile or half a mile of the land in question. Now as to how far that outcrop vein might exist is uncertain. There comes in your inference. If you infer that it does go back, then you say this is coal land. If you infer it does not go back, you say it is not coal land. Exactly so, it all depends then on inference. It is a question of

personality. While we are on that, I would like to say this—some people imagine that geology is an exact science. It is remarkably not an exact science, depending on the individual as you suggest. Something like the law, yes, you may say that. The coal formation is exposed. There are no surface conditions there that warrant as far as I know the inference that there is or is not coal because you have got a large area there of burnt outcrop where you do not see the physical conditions of the vein itself because it has been burnt up just the same as if you put a hod of coal in the stove, because it is gone." (R. 447)

Again he says:

"Now as a rule geological inference has been very costly in a merchantable way; that is, a great many people have gone on inference and have been disappointed and lost their money, by reason of not finding marketable coal." (R. 447-448)

And again:

"My opinion as to whether or not these lands involved in this case were at that time known coal mineral lands is that they were not. I would say in my opinion that a prudent coal miner would not be justified with the evidence present there at that time, that is the cliffs, the escarpment and the outcrops and other conditions you have described in pursuance of those showings there to go upon the land and spend money in the development of it, with this qualification." (R. 449)

On Page 450 he in substance says that one would not be warranted in going a half mile with "any surety" of getting what you expect to get or what you wanted to get.

If the character of this land is to be determined by the evidence, then that evidence is well nigh conclusive that none of the 5564.28 acres was known coal land in the years 1901 and 1904. In fact, even at this late day the coal can be obtained from this land only at an almost commercially impossible expense, and the certainty of it being found in commercial quantities can be established only by taking a chance and working the property. It may "pinch out" at any time.

SUBSTANCE OF DECISION OF COURT OF APPEALS.

In reversing the decision of the Trial Court, the Circuit Court of Appeals held (46 Fed. (2d) 980) (1931):

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of fact.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitation prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by the Carbon County Land Company and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against the Carbon County Land Company or Independent Coal & Coke Company.

6. That the decree of 1914 does not merely set aside the contract of sale between the State and the Milners but prevents the Milners and their successor, the Carbon County Land Company, and its grantee, the Independent Coal & Coke Company, from asserting any claim under certifications which the Milners fraudulently procured.

7. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907; that only the Congress of the United States could provide for the disposition of the lands of the United States.

8. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

9. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit made in 1914 is binding upon the Court of Appeals.

10. That the title to the 1120 acres of land claimed by the Independent Coal & Coke Company is impressed with a trust in favor of the United States.

SPECIFICATIONS OF ERRORS.

This defendant assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in finding that the evidence in this case established that the 1120 acres of land claimed by the Independent Coal & Coke Company were mineral lands, and known to be such on May 9, 1904, when the grant to such lands was approved by the Secretary of Interior, and erred in giving consideration to the testimony of the witnesses Taff (R. 106-174), Sowers (R. 454-523) and Dunn (R. 523-559), and documentary evidence introduced in evidence on the former trial; and also erred in failing to apply the standard of law which existed at the time said certification was made by the United States to the State of Utah; and also erred in finding that there was a material or any misrepresentation of fact as to the character of said 1120 acres of land.

2. That the Court erred in considering the testimony and the documentary evidence introduced in the trial of United States v. Milner.

3. That the Circuit Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon Milner and his corporation and the contracts held by him and such corporation, and not upon any title held by the State of Utah or now held by the Independent Coal & Coke Company.

4. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust upon the land involved, when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate or annul a patent or certification.

5. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with a reconveyance of the title to the land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the Court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and annulment of the grant in whatsoever form.

6. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basic foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

7. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit, and thereby permitting the United States to reap an unjust advantage from the representations of its representatives.

8. That the Court erred in failing to appreciate that whatever title is now held by the Independent Coal & Coke Company to the 1120 acres of land was not involved in the suit between the United States and Milner, and that such title is predicated upon facts that have arisen subsequent to the former adjudication, and that such adjudication was made before any issue relative to such title could possibly have arisen, and in failing to appreciate that the relation between the Independent Coal & Coke Company and the State of Utah is, by reason of the agreement made between the State and the Company, a direct one.

9. That the Court erred in failing to appreciate that the title acquired by the State through the certifications was both a legal and an equitable one, and that Milner and his associates did not have any equitable title at the time of the litigation commenced in 1907 and ending in the decree of 1914, and that the position of the State was that of a purchaser for value without notice of any fraud perpetrated upon the United States.

10. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

SUMMARY OF ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. Neither is the Independent Coal & Coke Company bound or affected by such decree.

The title or interest acquired by the Independent Coal & Coke Company was not and could not have been litigated in the suit referred to.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made.

The Circuit Court of Appeals should not have considered evidence introduced on the former trial.

POINT IV.

THE STATE A PURCHASER FOR VALUE WITHOUT NOTICE.

The State took the grant from the United States, charged with the obligation of establishing and maintaining the agricultural college and other institutions. This obligation constituted a valuable consideration. The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land.

ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a praty. Neither is the Independent Coal & Coke Company bound or affected by such decree.

If the decree entered in the suit of 1914 is conclusive and binding upon the State, then all proceedings had in this

suit commenced May, 1924, have been unnecessary and useless, because a constructive trust cannot be established or created against a defendant who has no title.

Even as between private parties, where the relation of vendor and purchaser exists, a judgment against the purchaser is not conclusive on his vendor.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;

Cadwallader v. Harris, 76 Ill. 370;

Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;

Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229.

In order to make the judgment available even to the grantee of the title, his convenantor must receive notice of the suit and have an opportunity to defend it. (Substance of suit in Kapioloni case.) A party in possession of land, claiming an interest as purchaser under a contract to purchase, is not in privity with his grantor in the sense that one is bound by a decree entered against the other. On the contrary, the claim of the grantee is adverse to the grantor, and the grantor is not bound by a decree against the purchaser in a case to which the grantor is not a party, rendered in a suit commenced after the contract to purchase was made.

Weed Sewing Machine Co, v. Baker, 40 Fed. 56.

It appears from the record that List No. 75, describing a large quantity of land, including the 1120 acres of land claimed by the Independent Coal & Coke Company, constitutes the selection made by the State of the land described therein. It was received and filed at the local Land Office March 24, 1903. (R. 307 and 485)

It appears that notice of publication relative to this selection was had in the newspaper known as the "Eastern Utah Advocate", of Price, Utah (R. 485); that a hearing was had in the local Land Office at Salt Lake City, to determine the character of the lands embraced in such list, June 15, 1903 (R. 485); that affirmative proof of the non-mineral character of said lands was transmitted to the Commissioner of the General Land Office. No contests, protests or suggestions as

to the mineral character of such land had been filed in the local Land Office (R. 485); that there was no other proof relative to the character of the land except the non-mineral affidavit attached to the list and proof of publication. This hearing was ex parte. It appears, however, to have been open and public, and there was no oral testimony taken before the Register and Receiver as to the character of the land. (R. 487)

The certification of this land, including the 1120 acres claimed by the Independent Company, was approved by the Secretary of Interior May 9, 1904. (R. 560) Of course, the title of the State in the lands selected by it, when finally approved, related back to the date of selection, March 24, 1903.

Harley O. Milner did not contract to purchase from the State until June 1, 1904. (R. 336)

There is no evidence in the record that Harley O. Milner made any representations, either by way of affidavit or otherwise as to the character of this land. He was not a party to the second amended bill of complaint filed by the United States in the suit entitled "United States v. Milner". (R. 195) He appears to have been named in the title of the original bill, but the prayer for process contained in said bill does not seek a subpœna against him. It is not shown that he ever appeared in the action entitled "United States v. Milner".

It is true that there are allegations contained in these pleadings, but it is submitted that the record does not show that the officers of the United States acted upon any representations made either in affidavits or otherwise by Harley O. Milner. In fact, the record shows that the representations were made by Heber M. Wells and Byron Groo, authorized agents of the State Land Board of the State of Utah. (See affidavit, R. 306)

However this may be, if Harley O. Milner was guilty of fraud in obtaining this contract, he did not acquire any equitable title or equitable right. The effect of the decree of 1914, as against him as a purchaser or as against any alleged assignee, was not to transfer any title from Harley O. Milner, or from his assignee, to the United States, but was merely to preclude said Milner, or his assignee, from thereafter asserting as against the United States any claim under the contract of purchase.

NATURE AND EFFECT OF CERTIFICATION.

This certification conveyed every conceivable interest that the Government had in the lands. It was not a void conveyance, as is claimed in the original and amended bills of complaint in the suit of United States v. Milner. (R. 188 and 209) Even conceding for the purpose of argument, and for that purpose only, that these lands were obtained from the United States by actual fraud, the grant would not have been void but merely voidable. The allegations contained in the pleadings in the original suit, to be found on pages of the record just referred to, are to the effect that the Land Department was without jurisdiction to certify these lands. It is submitted that such an allegation is entirely destitute of foundation, either in law or in fact.

It will be noticed from an examination of those pleadings that the United States relied upon Section 2449 of the Revised Statutes of the United States or the Act of August 3, 1854. This section reads:

> "Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby, but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

U. S. C. A., Title 43, Section 859.

It is settled law that a certified list issued under and pursuant to this section of the statute is of the same effect as a patent. In fact, it is a patent. The provision that where

lands embraced in certified lists are not of the character contemplated by the Act under which the selections were made by the State the lists shall be null and void, can be made operative only by courts called in due course to consider the titles thus created. Whether the lands are mineral or non-mineral in character when such lands are a part of the public domain, is a fact to be determined by the Land Department under the supervision of the Secretary of Interior before he approves or disapproves of the certification of the selected list.

The approved certification is an adjudication of the Land Department and is conclusive as against and impervious to collateral attack. It vests a perfect title in the grantee. It is like the judgment of any other special tribunal vested with quasi-judicial power. Such a judgment cannot be void, and, if voidable, can be vacated or annuled only by means of a bill in chancery filed in a court of competent jurisdiction.

Buena Vista Petroleum Co. v. Tulare Oil Co., 67 Fed. 226;
Moore v. Robbins, 96 U. S. 530;
Southern Development Co. v. Endersen, 200 Fed. 272-277;
United States v. Beaman, 242 Fed. 876;
Noble v. Union River Log Co., 147 U. S. 165;
Burke v. Southern Pac. R. R. Co., 234 U. S. 668;
United States v. Winona R. R. Co., 67 Fed. 948.

"The certificates were evidence that the officers of the Land Department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy, and their legal effect was the same as though patents to the State had been issued for the benefit of that Company."

And again:

"A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department it is like the judgment of other special tribunals, vested with judicial powers impervious to collateral attack."

If the Land Department did not have jurisdiction to determine the mineral or non-mineral character of this land, then it is pertinent to inquire in what tribunal was such jurisdiction vested?

Section 13 of the Enabling Act provides that the selection shall be made under the direction of the Secretary of Interior.

It will be noticed that the complaints, both amended and original, in the action entitled "United States v. Milner", do not seek to have the contracts of the Milners surrendered to the United States, but they do seek to have such contracts "surrendered up to the State of Utah for cancellation" (R. 215), but the decree had that effect without any physical surrender.

ISSUE INVOLVED IN MILNER SUIT.

It appears that on June 1, 1904, the State agreed to sell, and Harley O. Milner agreed to buy, 2244.24 acres of land for the purchase price of $3366.36. (R. 336-337) (This included the 1120 acres claimed by Independent Company.) There was a payment of 25c per acre and the balance of the principal was to be paid in ten equal installations of $280.53 each on January first of each year, commencing in the year 1905 and ending 1914. At the time this Milner suit was commenced (January 7, 1907) he had paid just three payments, and there was a balance due on the principal of $1963.70.

On January 8th, 1907 the State Land Board passed a resolution whereby the rights of Milner in the contract were to remain in "statu quo" during the pendency of the Milner action. (R. 266)

Without continuing this statement it is quite apparent that the title of the State to the land described in the Milner contracts was not involved, and no issue of fact or law could possibly have arisen in the Milner suit relative to the validity of the title of the State to any of this land. By the Milner suit the United States sought merely to annul the Milner contracts.

Third National Bank v. Stone, 174 U. S. 434; 43 L. Ed. 1035;
Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441;
Gajan v. Patout, 135 La. 156; 65 So. 16.

These cases are illustrative of the application of the well recognized principle that a judgment is not a bar to litigation of any demand or cause of action which from the nature of the case could not have been adjudicated in the former suit.

Quoting from the Louisiana case:

> "Again where two persons litigate titles set up by them, respectively, to particular property, and it is decreed to belong to one of them, though in fact it belongs to a third person not a party to the suit, such third person may thereafter, either sue for the property himself, or may transfer his right to the party cast in the litigation or to another, who may then exercise it, and renew the litigation for the vindication of the title thus acquired. In other words, a litigation is not conclusive as against those who are not parties to it, nor as to rights not possessed by the litigants at the time, save as to persons who are the privies of each other."

IMMUNITY OF STATE.

The State could not have been compelled to appear in the action. It was immune from suit by the United States except in the United States Supreme Court. The record in the Milner suit cannot be evidence against the State in this action.

Tindal v. Wesley, 167 U. S. 204.

Quotation from the opinion of Mr. Justice Harlan:

> "The State not being a party to the suit, the judgment will not conclude it."

It is not believed that there are any peculiar circumstances in this case that justify the holding of the Circuit Court of Appeals that the State is bound in equity by the decree of 1914. To say that because Mr. Maynard, the Special Assistant Attorney General, appeared before the State Land Board and served a copy of the complaint of the United States in the Milner action, and read portions of the opinion of Williams v. United States, 138 U. S. 514, that the State was compelled either to intervene in the suit while it was pending, or voluntarily convey the land after decree was entered in the

suit, is to controvert the entire purpose of the appearance of Mr. Maynard before the Land Board, and in effect destroys the immunity which enshrouds the State as a sovereign. It also requires the State to disbelieve the assurance given by Mr. Maynard and to ignore the prayer of the complaint which sought the surrender of the Milner contracts to the State.

It is submitted that the State is not bound by the decree of 1914; that the title now claimed by the Independent Coal & Coke Company was not involved in that suit and could not have been litigated therein, and if the State is not bound, then the Independent Coal & Coke Company is not affected by that decree or any provision thereof.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company.

The State relies squarely upon the provisions of Section 8, Act of March 3, 1891, and contends that this Act had the effect of making its title impervious as against attack by the United States; that is, no inquiry can be had relative to the validity of the title of the State to the land involved unless a suit involving such an inquiry was instituted within six years after these certifications were approved by the Secretary of Interior. As to the 1120 acres, such suit must have been instituted against the State within six years from May 9, 1904.

The Independent Coal & Coke Company contends that the position of the State is sound in this regard, and, if sound, it inures to the benefit of the Independent Company, and consequently the title of the Independent Company to the 1120 acres is not open to attack by the United States.

In the first place, it must be understood that the Statute of Limitations is unlike the defense of bona fide purchaser in this: that in some instances the latter defense merely sus-

pends the right of a plaintiff to assert his equity as against an innocent purchaser for value without notice, whereas the Statute of Limitations prevents the inquiry or investigation as to whether such an equity exists. It cuts off the right to attack without regard to equity.

In form the Statute of Limitations cuts off a remedy, but in substance it preserves and protects seisin, "because the person seised is owner till someone else proves a better right to seisin." (3 Holdsworth's History English Law, 93). The purpose of such statutes is to give stability to land titles, and to make their owners secure as against litigation or adverse claims arising from any source, without regard to equity.

Whether this action is treated as an original suit or as an ancillary one, that is, one in aid of a former decree, is, it is submitted, immaterial, so far as the application of the Statute of Limitations is concerned, because this action brings into litigation a different title than that which was involved in the suit of United States v. Milner. It is well established law that a creditor or claimant can reach, generally with the aid of equity, any property which the debtor might reach with said aid, but the ancillary action against the new party to reach such property must be brought within the period prescribed by applicable statutes of limitation.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

This action brought into litigation a title and, when the state came in, a party, that were not and could not have been involved in the former suit. The State did not hold that title in trust for the Milners during the pendency of the former litigation. The State never parted with any portion of that title, or *any equity in it, if the Milner contracts were procured by fraud.* The decree in the Milner suit did not and could not go further than to adjudicate that the Milners had no right, and the Independent Coal & Coke Company does not claim anything by virtue of the contracts which were adjudicated to be null and void by the decree of 1914. When that decree was entered and affirmed, the legal and equitable title to the land involved was vested in the State of Utah, and it is submitted that to vacate or annul that title the United States must have instituted its suit within the period prescribed by Section 8 of the Act of March 3, 1891.

It is true that the title passed from the United States to the State by means of what is called certifications, but it is submitted that these certifications are patents within the meaning of the section relied upon. That section reads:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent. (Sec. 8, Act of March 3, 1891.)

Notice the words "any patent". A patent is only another name for a land grant. Bouvier, in his law dictionary, defines the word "patent" as follows:

> "A grant of some privilege, property or authority made by the government or sovereign of a country to one or more individuals."

And again he says:

> "In the United States the word "patent" is sometimes understood to mean the title deed by which a government, either state or federal, conveys its lands."

2 Bouvier 2514.

In early times the custom grew up of granting exclusive privileges by means of letters patent, and finally the word "patent" was applied to any land grant made by a sovereign. We know that ever since July 4, 1836, and particularly since June 19, 1878, the President of the United States has not signed even those instruments that are called formal patents, but by express legislation these are signed by a secretary appointed by him for the purpose.

Title 43. Sections 8-9, U. S. C. A.

The practice has been for the State of Utah, ever since statehood, to make selections called lists (See List No. 75, R. 560), and then these lists, if found proper, are finally approved by the Secretary of Interior. (R. 560). This was not an unusual or exceptional practice, but the titles to thousands of acres of land find their validity in such a practice. No formal patent is issued, but the proceeding just described has the effect of a grant from the United States to the State,

and after obtaining such grant, the State either retains the land or sells or leases it, as its Land Board may decide. Surely no distinction can be made between what is called a certification, which is a land grant by the sovereign, and some instrument which purports to be signed by the President, but which is in fact signed by some secretary inferior in rank to the Secretary of Interior, when such instruments serve identically the same function.

United States v. Winona, 165 U. S. 463 (1897)

In that case it was claimed that the *certifications* were procured by fraud, but this court applied a section which is a mere complement to the Act of 1891 to the certification and held that the title of the purchaser had been confirmed. To do this, this court had to hold that the words "patent" and "certification" were synonymous, and the land department of the government has given a like construction to those words. The fact that neither the Executive Department of the National Government issued nor the Executive Department of the State Government required any formal patent is a practical interpretation of many years standing that the two words are used synonymously, and that a formal patent was not necessary.

CONSTRUCTIVE TRUST THEORY.

But it is claimed by the plaintiff, and held by the Circuit Court of Appeals, that the application of the section relied upon may be avoided because such section is no obstacle to a suit to impress a trust on the title to the land certified. This holding, if sound, is extensive in its consequences, because it virtually repeals Section 8 of the Act of March 3, 1891, and defeats the avowed purpose of this statute.

United States of America v. Amalgamated Sugar Company, 48 Fed. (2d) 156 (10th C. C. A.) March 5, 1931.

This case was argued in the Circuit Court of Appeals of the Tenth Circuit on the same day with the case at bar. It is cited herein for the purpose of showing the effect of sustaining the contention of the Government. In his special concurring opinion, Circuit Judge McDermott says:

> "The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands."

And again, after quoting from the opinion of this court in United States v. Chandler-Dunbar Company, 209 U. S. 447, he says:

> "This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title."

And again:

> "While the result seems to be to enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative and therefore concur."

He refers to the case of Lockhart v. Leeds, 195 U. S. 427, and United States v. New Orleans Pac. Ry. Co., 248 U. S. 507. It is submitted that Lockhart v. Leeds does not support, in any respect, the proposition contended for by the Government. With reference to the case of United States v. New Orleans Pac. Ry. Co., it is submitted that such case is not in point, because the United States was not suing to recover land which it owned or claimed to own, but it was suing to protect the rights of third parties, namely, homestead claimants, who had become involved in litigation with the railroad company, and where the United States brings a suit to protect the rights of third parties or bring a suit to declare a forfeiture because of a breach of conditions subsequent, the statute, of course, could not apply. Such suits are illustrated by the following cases:

United States v. Kern River Company, 264 Fed. 412 (9th C. C. A.) 1920.

In this case District Judge Rudkin, in speaking for the Circuit Court, uses language that is inconsistent with the contention that there is no distinction between certification and patent, but that case, while affirmed in this court, was not affirmed for the reasons given by Judge Rudkin.

Kern River Company v. United States, 257 U. S. 147, 66 L. Ed. 175.

An examination of the opinion of Mr. Justice Van Devanter reveals the following language:

> "But, in so far as this suit seeks to enforce a forfeiture for a breach of a condition subsequent, it plainly is not a suit to vacate or annul a patent, and so is not within the statute."

Cramer v. United States, 261 U. S. 219.

In this case suit was brought by the United States acting in behalf of three Indians, and it was claimed that the suit was barred by the identical statute under consideration. Mr. Justice Sutherland said:

> "The object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties."

La Roque v. United States, 239 U. S. 62.

In this case it was urged that this statute barred the action, but this court held that it had been determined that this section referred to patents issued for public lands of the United States, saying:

> "This trust patent was not issued for public lands of the United States but for reserved Indian lands, to which the public land laws had no application."

In fact, there is nor was no necessity for the application of this statute to any of the cases just cited, because laches is a defense to such actions.

United States v. Des Moines Navigation Company, 142 U. S. 510, 35 L. Ed. 1099.

In this case it was held that where the United States is only a nominal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the Government is involved, the defense of laches and limita-

tions, where the delay has been for thirty years, and circumstances have changed, will be sustained. Among other things, Mr. Justice Brewer said:

> "Before, however, examining the applicability of this proposition of law to the case at hand, one or two preliminary thoughts naturally arrest the attention. There has been long delay in presenting this claim. A third of a century has passed since the State conveyed to the Navigation Company, and more than a quarter of a century since Congress relinquished and granted to the State the title to these lands. During that time there have been marvelous changes in the population, the industries, the business interests of the State; legislatures and courts have been busy determining rights and establishing relations based upon the vesting of title in the Navigation Company. A proposition to destroy this title, and to put at naught all that has been accomplished in respect thereto and based thereon during these years, is one which may well make us pause. While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitation," (citing authorities); "yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties."

And again he says:

> "Even if this be regarded as a bill brought by the United States simply to protect its own interests, and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent, or other evidence of title, issued by the government in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong, and satisfactory.

> Muniments of title issued by the government are not to be lightly destroyed."

It is true that a grantor who has been defrauded of his land may bring a suit in equity, the purpose of which is to obtain a formal cancellation or annulment of the grant, or he may elect to bring a suit in equity to have the fraudulent grantee declared a constructive trustee. But it is submitted that the decree declaring a constructive trust is nothing more or less than a cancellation or annihilation of the grant. No such trust can be declared without vacating and annulling both the form and the substance of the grant. If the latter is affirmed, it stands (213 Fed. 722) and is an immovable obstacle to the impressing of a trust. If the trust is declared, the grant is annihilated. This statute should not be sacrificed to any such a fiction as a constructive trust. Such a trust is a mere assumption—not a fact; indulged in not as an end but to work out another purpose—in this case, to bring about a vacation of the grant. This statute creates a rule of property, and the decisions of this court have so held.

United States v. Winona, 165 U. S. 463, (supra)

In that case it was claimed that the certifications were procured by fraud, but this Court applied a section of this identical legislation to the certification and held that the title of the purchaser had been confirmed, treating the words "patent" and "certification" as synonymous.

United States v. Chandler-Dunbar Co., 209 U. S. 447-450.

In this case the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The United States replied that the action was not one to vacate and annul a patent but to quiet title. This contention of the Government was not sustained, the Court using the following language:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell

v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

Robinson v. Hook, 4 Mason 132; 20 Fed. Cas. 1017, decided by the Circuit Court for the District of Maine in 1826, Circuit Justice Story rendering the opinion. He said:

> "But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted, that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases, like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar, and may be pleaded to a suit in equity as well as at law."

He cites Elmendorf v. Taylor, 10 Wheat. 152, decided by Chief Justice Marshall in 1825. Quotation from syllabus:

> "Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired."

In his opinion Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, 'strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who

> are not permitted to do anything adverse to it.' They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

To avoid the Statute of Limitations, because of a trust, the latter must be of a technical and continuing character, which falls properly and peculiarly within the exclusive jurisdiction of a court of equity.

> Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 411.

This decision was rendered by Chief Justice Kent in 1823. The courts throughout this country have always regarded it with great respect because it is an exhaustive discussion of the authorities and principles relating to the application of statutes of limitation to cases where a trust is involved. From it, one is compelled to deduce the principle that the statute barring a concurrent remedy cannot be avoided by merely seeking to establish a constructive trust.

> New v. Smith, 86 Kan. 1; 119 Pac. 380.

The Court said:

> "Looking beyond mere form of the action to the real issue therein we hold that the action is an action for relief on the ground of fraud, and that the two-year limitation applies."

> Landis v. Saxton, 105 Mo. 486; 24 Am. St. 403.

This case recognizes the principle that if the remedy of a constructive trust is merely concurrent with some other remedy, that is barred, then the statute applies with the same force to constructive trusts as it does to the concurrent remedy.

From these authorities, and the others cited in the petition, it is apparent that the decision of the Court below is in conflict with the prior decisions of this Court, which recognize the statute as creating a meritorious right, and also

with the general law of the land as it has been established by the leading cases announced by the Courts.

From the opinion in the Amalgamated case, the conclusion is inevitable that at least one member of the Circuit Court of Appeals of the Tenth Circuit had grave doubts or misgivings as to the validity of the contention made by the Government, and that he relied upon the New Orleans case, supra, which is clearly distinguishable from the case at bar.

If the rule announced in this case, and in the Amalagamated case, is sound law, then one may own and possess a tract of land for fifty or even a hundred years, and if mineral or coal is discovered upon that land at any time, however remote from the grant, then, if some expert geologist can truthfully testify that the fact of the presence of this mineral or coal ought to have been known prior to the federal grant, then the title of the private owner fails. It is submitted that this is sacrificing substance and reality to form and fiction.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made.

In the first place, it is submitted that neither the Circuit Court of Appeals nor the Trial Court should give any consideration to the evidence that was read into this record from the transcript of the testimony in the case of United States v. Milner. The record in that case cannot be evidence against the State in this case " for any purpose touching the merits of its claim." (Language of Mr. Justice Harlan in Tindal v. Wesley, supra.)

The interest in the 1120 acres which was litigated and determined in the case of United States v. Milner, was the interest which Harley O. Milner attempted to acquire by his contract of June 1, 1904. (R. 336) The decree of 1914 could have no other or further effect than annuling that interest. That interest is an entirely different interest than that claimed by the Independent Coal & Coke Company in this case.

In the latter part of 1919 and the early part of January, 1920, the Carbon County Land Company entered into a new contract with the State of Utah and agreed to buy the entire 5564.28 acres for the purchase price of $100 per acre, and, pursuant to that contract, the State made its State patent to the Carbon County Land Company, February 10, 1920. Thereafter, in October, 1920, this Independent Company entered into an agreement with the Carbon County Land Company as to the 1120 acres, and also entered into an agreement with the State so that the relation between the State and the Independent Coal & Coke Company was original rather than derivative. The State's interest in the 1120 acres of land under this arrangement passes directly from the State to the Independent Company, and the Independent Company's obligation to pay the State for that interest is direct, and the Carbon County Land Company is eliminated from the transaction so far as the State and the Independent Company are concerned.

As has been pointed out, no evidence appears in this record that Harley O. Milner ever committed any fraud or made any fraudulent representations; neither did the Carbon County Land Company. While there is no evidence of it, it appears to have been claimed by the Government that the Carbon County Land Company was the assignee of Harley O. Milner. Be that as it may, the fraud that is claimed in the former suit was committed by Stanley B. Milner, according to the allegations of the United States as they are set forth in the original and amended bills of complaint.

Stanley B. Milner died on the second day of May, 1908 (R. 213), six years before the decree in the former suit. The non-mineral affidavit upon which the General Land Office and the Secretary of Interior relied in issuing and approving the certificate made May 9, 1904, was that of Governor Heber M. Wells and Byron Groo, agents of the State Land Board.

(R. 303). These officials of the State seemingly exercised their honest judgment with reference to the character of this land. Although the matter was public and was pending from March, 1903, until May, 1904, no protests were made, and it is difficult for anyone to find any fraud perpetrated by Harley O. Milner, or by any one representing him.

Construing the record most favorably to the United States, and for the purpose of argument and for that purpose only, assuming that Harley O. Milner did commit a fraud, and by means of that fraud obtained the contract of June 1, 1904, still the effect of that fraud was nullified by the decree of 1914, and neither Harley O. Milner nor any one representing him or in privity of estate with him, got any benefit whatsoever from the alleged fraud. Evidence of that fraud, if evidence there is, is entirely immaterial to the issue as to the title involved in the case at bar.

The Independent Company's interest comes from the State. That interest has never been litigated and could not have been litigated in the former Milner suit, and consequently the finding that Certificate No. 75 was fraudulent is not supported by any evidence. Neither is there is any sufficient evidence to support the finding that these lands were mineral in character.

As was said by Mr. Justice Brewer in United States v. Des Moines, 142 U. S. 510, supra:

> "Muniments of title issued by the Government are not to be lightly destroyed."

It appears from the evidence, and is conceded in the opinion of the Court below, that there was no exposure of any commercially valuable coal on any subdivision of the lands selected; that at the time of the selection there was a rule of the General Land Office at Washington to the effect that without such exposure the lands could not be listed as mineral. To this rule both the United States Land Office and the State Land Board were subject (R. 143), and, pursuant to that rule, these lands were certified to the State May 9, 1904.

Sometime in the year 1906 Mr. Taff, who was not in sympathy with this rule and claimed that it was "nonsensi-

cal" (R. 144), undertook to "start something" in the direction of having the rule changed. He regarded the rule as "ridiculous" (R. 144), and it was not until the early part of 1907 that he classified the lands involved as mineral or coal lands. (R. 145) In other words, the suit of United States v. Milner was commenced January 7, 1907, and even at the time of its commencement the lands involved in that suit had not yet been classified as coal lands.

As late as July 29, 1904, Mr. P. S. Sowers stated:

> "While the coal vein is probably under this land, or some parts of it, yet I could find no man who would make an affidavit to it as a fact because of the absence of croppings or work to prove it." (R. 358)

From such evidence it was reasonable for the Court below to conclude that Milner and his associates, in making their application to obtain this land for grazing purposes, had no moral turpitude, i. e. that they were acting honestly in obtaining these lands by the only method that was at that time open to them under the law.

With reference to the rule requiring an outcropping of coal as a prerequisite to a classification of the land as coal land, it is believed that instead of that rule being "nonsensical" or "ridiculous", as designated by the witness Mr. Taff, it was, on the contrary, the most reasonable and efficacious rule, in view of the nature of the land as it exists in Carbon County, Utah. Veins of coal found in the north half of Section 10 were reached only by an expenditure of approximately $360,000, and it remains for the future to demonstrate whether that expenditure can be justified commercially. Part of these coal veins have in the remote past been burnt out.

As Mr. Sowers said in writing in 1904, in substance, that some of the coal was 1000 or 1500 feet beneath the surface and it had no commercial value "even in considerable deposits", because of its practically being inaccessible to the market. (R. 458) The outcropping rule has been applied for years to metalliferous deposits. It has the virtue of certainty about it, whereas, the rule of geological inference, so-called, generally results in uncertainty. The doctrine of extra-lateral right as to veins of ore finds its origin here.

No change was made in the rule whereby the character of the land was determined by outcroppings until 1911, when the Circuit Court of Appeals of the Eighth Circuit, in the Diamond Coal & Coke Company case, appears to have declared a different rule. This case was not affirmed in this court until April, 1914. Apparently the decision of Judge Marshall of the District of Utah, in United States v. Milner, awaited the decision of this Court in the Diamond Coal & Coke Company case, and in June, 1914, the decree was entered in the Milner suit.

It is true that decree adjudicates that in a *legal sense* Milner was guilty of a fraud in obtaining the contracts to purchase the land, but certainly that adjudication does not adjudicate the title of the State to the land in question, because that title was not and could not have been an issue in the Milner suit.

A retroactive application of the new rule had the effect of making that which was honest at the time of its commission, fraudulent ten years after its commission.

In Clancey v. Barker, 131 Fed. 161, Eighth Circuit, 1904, Circuit Judge Sanborn said:

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto law."

In the case of United States v. Maxwell, 121 U. S. 325; 30 L. Ed. 949, Mr. Justice Miller used the following language:

> "In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of

> the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistence to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This language is peculiarly applicable to that witness Mr. Taff, who designated the outcropping rule as "ridiculous" and "nonsensical", and who undertook to "start something" to have that rule changed.

It is a fundamental rule of law that if a representation is true when made and when acted upon, it cannot constitute actionable fraud, because a subsequent change in conditions makes the representation false. A fraudulent representation respecting property, either bought or sold, means in law a statement of a material fact, false when made, and known to be false. It must be shown that the party to whom it was made relied upon it and believed it to be true. No other rule than this could be tolerated in the law.

The only representation made here, so far as the 1120 acres are concerned, appears to have been made by the officers of the State, who acted honestly. The representation that these lands were grazing lands and non-mineral in character was true at the time it was made. There was no change in the rule for the determination of the character of the land for many years after such representations were made. It is submitted that the making of a retroactive application of the new rule announced ten years after the certification of the land is contrary to the fundamental principle generally conceded by men that the character of an act is to be determined by the standards in force at the time of its commission.

A paraphrase of the language of Mr. Justice Brewer is United States v. Winona, supra, is not out of place. Conceding that the rule was erroneous, yet it was one made by the officers of the Department, charged with the duty of administering the grant and determining what lands did and what did not pass—the only tribunal to which the applicant for the land could then apply and upon whose rulings he was bound to act.

For these reasons it is submitted that the certifications of the land involved were not tainted with fraud, committed either by Stanley B. Milner, Harley O. Milner or the officers of the State or any other person.

POINT IV.

THE STATE A PURCHASER FOR VALUE WITHOUT NOTICE

The State took the grant from the United States, charged with the obligation of establishing and maintaining the Agricultural College and other institutions. This obligation constituted a valuable consideration The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land.

In the opinion of Mr. Justice Stone, 274 U. S. 640, when this case was before this Court on the sufficiency of the complaint, it was in substance said that the Carbon County Land Company could not acquire the lands even through a new and independent contract without a surrender of such rights as it had under the earlier contracts. It seems to have been assumed that the Carbon County Land Company was a party to a fraudulent scheme or conspiracy to acquire title to the lands involved. It does not appear by any evidence in the record that Harley O. Milner, who had the contract for the 1120 acres, made or caused to be made, any representations, true or false, with reference to the character of that land. There is no evidence that he was attempting to acquire the land for the Carbon County Land Company. The only proof submitted to the Land Department upon which the certification was made, was the non-mineral affidavit attached to List No. 75, made by Heber M. Wells and Byron Groo, (R. 485) and it appears that they acted honestly, on the information that they then had. In the opinion of Mr. Justice Stone, it is said that bona fide purchaser is an affirmative defense, and in view of the fact that the former hearing related only to the sufficiency of the original complaint in this action, it is difficult to see how the question of bona fide purchaser could have been involved on that hearing. The Carbon County Land Company, at the most, had only the small interest of the cash payment and of the payment of three installments made by Harley O. Milner, at the time of the institution of the Milner suit in January, 1907, that is, if the Carbon County Land

Company had any such interest at all. As has been pointed out, it does not seem that Harley O. Milner was before the Court in that action at all. Assuming that he was, or assuming that he had assigned to the Carbon County Land Company, the decree effectively cancelled and annulled that interest, and a physical surrender, it is submitted, was unnecessary, especially in view of the assurances made by Mr. Maynard, and in view of the specific prayers of the complaints that such interests be surrendered up to the State, instead of the United States, for cancellation. Mr. Justice Stone qualified the statement of the Court by the phrase "unless the State stood in the position of a purchaser for value without notice".

Now, it is true that the rules relative to valuable consideration and to innocent purchasers paying such consideration, do not and cannot apply as between the United States and the State, in any ordinary sense. The United States became the owner of this land by its treaty with Mexico. History tells us that the approximate sum of $20,000,000.00 was paid to Mexico by the United States, but the assertion that this was paid for the vast area of territory acquired is rather difficult to believe. The State became the owner, if at all, by the grant contained in the Enabling Act, followed by the certifications. Of course, the new state paid no money for the land. This grant was made for a specific purpose, from which a general public benefit will result and has resulted to both the State and the nation. List No. 75 was certified with the purpose of establishing and maintaining the Agricultural College. When the State took such grant, it took it charged with the obligation of applying the land contained therein to the purpose specified in the grant. If the State received that grant, as it did, without any notice of the fact that the lands were known coal lands, then it is submitted that the State would be an innocent purchaser for value without notice.

In the case of Stanley v. Schwalby, 162 U. S. 253, it appears that the City of San Antonio, Texas, had conveyed a tract of land to the United States for the establishment of military headquarters there. Mr. Justice Gray, speaking for a unanimous court, said:

> "A valuable consideration may be other than actual payment of money, and may consist of acts to be

done after the conveyance." (Citing authorities) "The advantage inuring to the City of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the City to the United States."

It is believed that on the authority of the Stanley case, the State of Utah is a purchaser for value without notice. It should be remembered that the entire acreage involved in this suit has been charged and is still charged by the United States as against the State as a pro tanto satisfaction of the grants contained in the Enabling Act.

CONCLUSION.

It requires no particular mental effort to determine that the Independent Coal & Coke Company transferred to the Carbon County Land Company, in October, 1920, the equivalent of over $200,000; that said Independent Company has paid to the State of Utah and Carbon County taxes for the years 1920, 1921, 1922 and 1923 approximately $40,000, or about $15,000 per annum; that the Independent Company has paid out in driving tunnels between 1920 and May 16, 1924, approximately $360,000; that it in the main has carried the burden of this litigation from the time of its commencement in May, 1924, down to the present date. These sums have been paid out and these efforts exerted all in reliance upon the validity of the title to this tract of 1120 acres.

Since the certifications, great changes in population and in methods of work and in the coal industry, and even in fundamental concepts, have taken place. It appears that rules of construction and administration have been changed by executive departments. Even the rules of law and their application by the Courts have taken on different forms. There is a great difference between everyone's outlook in these closing days of 1931 and the closing days of 1904, when this land was certified.

It may be that this Company and its counsel erroneously interpreted the law in October, 1920, but it is submitted that it cannot in justice be held otherwise than that the Company acted honestly and openly, without any intent to defraud either the United States or the State. At no time intervening

between 1920 and the present has this Company undertaken to secure any benefit for which it has not paid a full and adequate consideration.

If the contentions herein made shall be sustained by this Court, the State of Utah and its institutions, particularly the Agricultural College at Logan, Utah, will receive a substantial benefit of $112,000 and accrued interest, but that benefit will inure to the average citizen and finally take form in the education of the youth. The back taxes to be paid to Carbon County will amount to more than $100,000 without penalties, and the taxes to be assessed and collected in the future will be at least $15,000 per annum.

As to the land claimed by the Independent Company, the controversy in one aspect is in fact between the United States and the Agricultural College, an institution which for many years has actively promoted a great national purpose.

Independent of all these considerations, and more important than any one of them or even all of them combined, is the question: Shall the constructive trust theory enunciated by the Circuit Court of Appeals of the Tenth Circuit in this case and in the Amalgamated case (48 Fed. (2d) 156) be made an avenue through which the Statute of Limitations may be avoided and in effect repealed? If the Circuit Court of Appeals is affirmed upon this point, then the stability and security of land titles in not only the State of Utah but in every one of our public land States has been destroyed.

It is submitted that a proper application of the rules of law, as they have been announced by this Court, requires a reversal of the decision of the Circuit Court of Appeals.

Respectfully submitted,

MAHLON E. WILSON,

FRANK K. NEBEKER,

Attorneys for Independent Coal & Coke Company.